SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940.

No. 172.

I. H. NAKDIMEN, ET AL., PETITIONERS,

VS.

LAZARE BAKER, RESPONDENT.

REPLY BRIEF OF PETITIONERS.

JAMES B. McDONOUGH,
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We concur in the statement of the Court of Appeals that the controlling facts are not in dispute. The Court of Appeals was led into error by an erroneous view of the law on the several points discussed below. The purpose of this reply brief is to call attention to some of the errors of the respondent in his opposing brief, and also, incidentally, to show the errors of the Court of Appeals as manifested in the last opinion. Candidly, we submit that the respondent in his opposing brief has failed to discuss the controlling questions.

I.

Respondent's erroneous statement of the nature of the case on the first appeal.

Under the title "The First Appeal," the respondent, by a statement unsupported in the record, attempts to

contend that the first amended complaint stated a cause of action called a breach of contract (Respondent's Brief, page 2). The respondent's first amended complaint was a suit in conversion—a plain and simple tort action. *His evidence failed to support his allegations.* Said complaint filed September 10, 1937 (First R-2), about ten months after his original complaint was filed, the latter being filed October 27th, 1936 (First R-64), and twenty-one months after the contract of purchase and sale was made. The said first amended complaint recites that leave of the court was had, but no court order is in the record to that effect. The respondent, in all the proceedings in the District Court and in the Court of Appeals, on the first appeal, vigorously asserted and contended that said suit was a *conversion* suit; but the Court of Appeals (100 Fed. (2) 195) held that it was not a conversion suit. The respondent seems now to contend in his opposing brief that his first amended complaint was not in conversion. But the result is the same even though he did not state a cause of action in conversion. The law prohibits his occupying inconsistent positions. The respondent's contentions and not the result of the suit precludes his maintaining the second suit. Even if the first suit is dismissed without prejudice, he is barred. An Arkansas case exactly in point is *Belding* v. *Whittington,* 154 Ark. 561. Substantially, the effect of the decision of said court on the first appeal is that no cause of action was stated. Said court, in said first appeal, said:

> "The appeal presents but one question necessary to its determination,"

and further said:

> "The case is clearly controlled by the decision of the Supreme Court of Arkansas in the case of *Grist* v. *Lee,* 124 Ark. 206."

That case, in its facts and principles, is identical with the case at bar, and we respectfully urge that that case does control the federal courts in the decision of this case, and on account of that case the Court of Appeals on the first appeal should have dismissed the case, or should have reversed the same with an order to the District Court to dismiss it. In our opinion, that case, and the decision therein, is alone sufficient to justify this court in granting a writ of certiorari, and in reversing this case.

Notwithstanding the respondent, throughout all the proceedings in this cause, as above shown, asserted and admitted that the first amended complaint was a plain suit in conversion, now for the first time in this litigation the respondent makes the following wholly unsupported statement in his brief as to the nature of the action described in said first amended complaint, to-wit (Brief, p. 2):

> "The first amended petition (Record in 11190, p. 2) in the first trial sought recovery for the failure and refusal of defendant to carry out an agreement of sale by plaintiff and purchase by defendant of shares of plaintiff in the City National Company, by failing and refusing to contemporaneously deliver his note, with the collateral sold in payment to plaintiff."

That statement plainly describes a cause of action for breach of contract. The first complaint was not for a breach of contract. It was for conversion. The laws of Arkansas do not permit the respondent to contend now for the first time that the first amended complaint stated a cause of action for breach of contract.

Cox v. *Harris,* 64 Ark. 213.
Belding v. *Whittington,* 154 Ark. 561.

Bush v. *Barksdale,* 122 Ark. 262.
A. F. Shapleigh Hdw. Co. v. *Hamilton,* 70 Ark. 313.
Grist v. *Lee,* 124 Ark. 206.
(See other case on page 31 of our brief.)

The only purpose which we can see the respondent could have in making that unsupported statement is to escape the application of the laws of Arkansas as set forth in the above cases to the effect that the respondent after failing in his conversion suit cannot maintain a suit for breach of contract.

II.

The suggestion of the Court of Appeals on the first appeal as to amending the complaint, and the other language of said court as to the effectiveness of the note is *obiter dictum*—and also as to a cause of action for breach of contract, is *obiter dictum.*

This conclusion is established by the language of the Court of Appeals on said first appeal. That court (100 Fed. (2) 196) said:

> "The appeal presents but one question necessary to its determination;" and
>
> "The case is clearly controlled by the decision of the Supreme Court of Arkansas in the case of *Grist* v. *Lee,* 124 Ark. 206."

This court, in the case of *Carroll* v. *Lessee of Carroll,* 16 How. 265, said:

> "And therefore this court, and other courts organized under the common law, has never held itself bound by any part of an opinion in any case which was not needful to the ascertainment of the right or title in question between the parties."

Without further discussion on that point, we refer to the following authorities:

O'Donoghue v. *U. S.*, 289 U. S. 516.
Connor v. *Blackwood*, 176 Ark. 139.
Scruggs v. *State*, 131 Ark. 320.
Payne v. *State*, 124 Ark. 20.
U. S. v. *Waite* (8th Cir.), 33 Fed. (2) 567.

III.

Respondent claims in his brief (pages 4, 25) that petitioner asserted in the first appeal that the suit was on contract and not conversion.

Even if the petitioner had so contended in his brief before the Court of Appeals in the first appeal, that contention was not in conflict with the contention of petitioner now. A statement that the suit was upon contract and not in tort, is not a statement that it is a suit for breach of contract. The petitioner moved the court (First R-5) to dismiss the first amended complaint because the same did not state a cause of action. That contention did not mean that the first amended complaint stated a cause of action for breach of contract. There was no such issue in that case then. The issue was conversion or no conversion. Under the authorities on the subject a suit on a contract means a recovery based on the contract, and not a recovery for a breach of the contract. But the Court of Appeals, on the second appeal, destroyed the complaint as a pleading. That court (111 Fed. (2) 778) said:

> "Plaintiff's original petition (referring to the first amended complaint) was so drawn that it was impossible to determine whether the cause of action was based on the contract, or tort, or both."

A complaint that is so drawn as to make it "impossible" for a court to say what the nature of the cause

of action is, certainly violates the new federal rules and all other sound rules of pleading, and wholly fails to state any cause of action at all.

The Court of Appeals for the Eighth Circuit in suggesting an amendment to a complaint, which it was impossible for the court to understand, and in refusing to dismiss the second amended complaint (Second R. 11, 12), plainly refused to follow the law of Arkansas as settled and determined by the Supreme Court of that state in 1886 and as reaffirmed in 1902 in the case of *A. F. Shapleigh Hardware Co.* v. *Hamilton,* 70 Ark. 319, wherein the said Arkansas court, discussing the exact question, said:

> "It is settled, by an almost unanimous series of decisions in various states, that if a complaint or petition in terms alleges a cause of action *ex delicto,* for fraud, conversion, or any other kind of tort, and the proof establishes a breach of contract, express or implied, no recovery can be had, and the action must be dismissed, even though by disregarding the averments of tort, and treating them as surplusage, there might be left remaining the necessary and sufficient allegations, if they stood alone, to show a liability upon the contract."

And the Arkansas court added this:

> "A party cannot sue in tort and recover in contract or assumpsit."

The respondent in his brief cites cases on various points from Illinois, Connecticut, and other states. The law of Arkansas, and not the laws of other states, governs.

In the case of *Grist* v. *Lee,* 124 Ark. 206, which, as we have stated, is identical in facts and principles with the present case, the Supreme Court of Arkansas reversed and dismissed the case with this language:

> "We think, therefore, that error was committed in thus permitting appellee to change the nature of his cause of action, and the judgment must, therefore, be reversed, and the cause will be dismissed."

The Supreme Court of Arkansas in *Unionaid Life Ins. Co.* v. *Crutchfield,* 182 Ark. 825, said:

> "A cause of action for breach of a contract and one for fraud in procuring such contract cannot be joined, the one being *ex contractu* and the other *ex delicto.*"

In the cases heretofore cited from the Supreme Court of Arkansas it is clear that where a complaint is so drawn that it is impossible to tell its nature, said complaint should be dismissed, and it cannot be changed by any court from a tort action to a contract action. Contract actions, as before suggested, are of two kinds. One is for the breach of a contract and the other is to recover money that the defendant is obligated to pay. It is our contention in this case that neither the first complaint nor the first amended complaint, nor the second amended complaint, stated any *present* cause of action. The very language used in the second amended complaint, and the language used by the District Court in his findings of fact and conclusions of law, is not language to be found in an action to recover damages for a breach of the contract. The breach action cannot, therefore, be maintained for the reason, as elsewhere stated, that the note is valid and in existence and there has been a constructive delivery, and since the note will not now be due until December 7, 1940, no suit can be maintained until after that date.

IV.

Under the laws of Arkansas there was a constructive delivery of the note and the certificate, and therefore, there can be no recovery for a failure to deliver said documents.

In our brief before the Court of Appeals in the second appeal we cited the cases here cited on the point that there was a constructive delivery of the note and the certificate. We also contend that Section 2159 of Pope's Digest, which is quoted in our brief on petition for certiorari, authorizes a suit by the respondent against the petitioner on the note and the certificate *but not until after the note becomes due.* The respondent, by his bringing of the conversion suit, which was not disposed of by the Court of Appeals on the first appeal until after the expiration of the three years, and by his failure to give the notice of the maturity as provided in the note, precluded the petitioner from giving a notice of extension. That question is dwelt with in our answer in this case.

The case of *Johnson* v. *Johnson,* 188 Ark. 992, seems to us in point and controlling on the question of delivery of the documents. In that case, it appears from the report that J. R. Johnson sold to W. S. Johnson $4,000 worth of the capital stock of the Johnson Orchard Co. W. S. Johnson gave to J. R. Johnson three promissory notes in payment thereof. On the question of delivery the court said:

> "The fact that the stock was retained by J. R. Johnson and never delivered to the appellant is immaterial. The contract is that the stock was to be held by J. R. Johnson only as collateral security for the payment of the notes evidencing its purchase price. As between the parties, delivery was not necessary to vest title in the buyer and title to the

stock passed, although it was not delivered to the appellant but remained in the possession of the seller."

On that the Arkansas court cited several cases. In addition, we refer this court to the following cases showing that the circumstances surrounding this deal and the conduct of the parties establish a constructive delivery on December 7th, 1935.

Lynch v. *Dagget*, 62 Ark. 592.
Field v. *Simco*, 7 Ark. 269.
Kate La Nieve Co. v. *Plant*, 172 Ark. 82.
Vance v. *Bell*, 153 Ark. 229.

If we are right in our contention as to the constructive delivery, *it is impossible for the respondent to recover for a breach of contract.* The breach alleged is the failure to deliver the note and other documents. Since the Arkansas law proves that there was a constructive delivery, necessarily there can be no recovery for a failure to deliver. No wrong is done to the respondent by such a view of the law and the facts. The respondent knew (First R-23) that I. H. Nakdimen could buy his stock provided he was willing to give time. He had his attorney come to Ft. Smith to assist in the sale. He therefore knew that the money would not be due either until December 7th, 1938, or December 7th, 1940.

V.

The court has no power to elect for a litigant.

That principle was decided by the Supreme Court of Arkansas in the case of *Cleveland* v. *Biggers*, 163 Ark. 277.

VI.

There never was any unqualified refusal by I. H. Nakdimen.

It is the well established rule in Arkansas that before one party to a contract can treat the contract as breached *there must be an unqualified refusal.* (*Majestic Milling Co.* v. *Copeland,* 93 Ark. 195.)

VII.

If there was a breach, and we say there was none, it was waived by Baker.

It is undisputed, and such is the evidence of Baker, that when he went to the bank on the morning of December 7th, 1935, he asked for the note and other documents. According to Baker's evidence, from that day until February 3rd, 1936, *he never again mentioned the subject to I. H. Nakdimen.* His evidence also shows, which we have set up in our statement of the case, that he acquiesced in the delay brought about by Nakdimen's request, and consented thereto. Instead of resigning on December 7th, 1935, he held his office as secretary-treasurer until February 21st, 1936, *and drew his salary up to the latter date.* The salary which he drew between December 7th, 1935, and February 21st, 1936, was not deducted from the purchase price of the stock (First R-51). He assented to the delay *and he received his salary for sixty days by reason of his assent to that delay.*

VIII.

Baker treated the contract as in full force and existence on December 7, 1935, and also on February 3rd, 1936.

It is well settled that when one party treats a contract as valid, the contract remains in existence for the

benefit of both parties. (See the cases cited by us beginning on page 27 of our brief in support of our petition.)

IX.

The respondent never gave the petitioner any notice that the respondent would treat the contract as breached by the petitioner.

The law is well settled that before the party who claims a breach can treat the contract as breached, he must give notice to the other party that his conduct will be treated as a breach and the other party has a reasonable time in which to perform.

> See our brief, paragraph IV, and especially page 29 and following.

On February 3rd, the respondent demanded performance from Nakdimen but did not say he would treat the contract as breached *and did not limit the time within which Nakdimen was to perform.* In respondent's brief mention is made of a *contemporaneous* delivery of the note and other documents. There was no agreement of that kind, but it is not necessary to dwell on that question as the other questions, in our opinion, give the petitioner the right to the writ and to a reversal. If there was such an agreement the delivery on December 7, 1935, was waived.

X.

Specific Performance.

Under the decisions of the Supreme Court of Arkansas herein cited, the respondent as a matter of law, as is shown by his own evidence, waived the delivery of the note and documents on December 7, 1935, and remained

as secretary-treasurer *and drew his salary up to February 21, 1936.* By his own testimony it is shown that after his acquiescing in the delay suggested by Nakdimen, and after his consenting to said delay and receiving a consideration therefor in his salary, *he never again mentioned the delivery of the note and other documents until February 3, 1936.* Baker's silence covering the period up to February 3, 1936, establishes his consent to the postponement. Under the decisions of the Arkansas court elsewhere cited, when Baker again demanded performance and offered performance on February 3, 1936, he again thereby elected to treat the contract as in full force and effect. Since Baker did not notify Nakdimen that he (Baker) would treat the contract as abandoned or breached by Nakdimen unless the latter performed within a certain time, said contract was therefore in full force and effect up to and including February 9, 1936. Under the law, Nakdimen had a reasonable time after February 3, 1936, in which to offer full and complete performance. Therefore, when Baker *as a condition of accepting the note and other documents demanded traveling expenses, which he later admitted he did not intend to charge, and also demanded attorney's fees, which under the law he was not entitled to, he necessarily breached the contract on February 9, 1936, by refusing to perform.*

This argument is further supported by the doctrine of constructive delivery elsewhere discussed. Baker therefore breached the contract himself; and since a court of law had no jurisdiction to enforce specific performance, Nakdimen was entitled to have the cause transferred to the equity docket unless, under the federal rules, equity principles could be preserved to Nakdimen under Arkansas law. We have cited the controlling cases on that subject on pages 33 and 34 of our brief in support of our petition.

XI.

Additional reason requiring the Court of Appeals on the first appeal and on the second appeal to dismiss the cause.

On page 86 of the first record it is shown that the District Court instructed the jury that if they found for the plaintiff they would find the amount of the note and certain interest; and also the court said: "On the other hand, if you find for the defendant, the result is that the note and the obligations in the case, the stock—*I mean the note obligation and the stock, having been tendered into court here, will be for the plaintiff to accept.*" And on the same subject the court added: "*If you find for the defendant, then they (plaintiff) follow the terms of the contract and agreement and accept the note of $13,125.00.*"

The jury, because of the errors of the District Court, found there was a conversion. The Court of Appeals on the first appeal found as a matter of law that there was no conversion. The respondent concurred in and adopted those instructions of the court. Therefore, the respondent in substance and effect asserted and contended that if there was no conversion, *the respondent was the owner of the note and other documents.* Therefore, under the decisions of the Arkansas court, the respondent cannot now claim that there was no delivery of the note and other documents to him.

XII.

Errors of the Court of Appeals and respondent as to the effect of Nakdimen's offer to perform on February 9, 1936.

The Court of Appeals says that a short answer to that contention would be that the question was not

raised. Under Rule 15 of the new federal rules, it is our understanding that the pleadings will be treated as amended to conform to the proof where no objection is offered to the introduction of the evidence. Since the evidence was the plaintiff's own testimony, there was no objection. But, in addition, the question was raised by setting up estoppel and waiver in the answer and in the trial. The court's attention is directed to that in our petition for certiorari.

We have found nothing in the rules that can be held to reverse the decisions of this court in *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, and the other cases by this court on the same subject. We find that under the new rules that a request for findings is not necessary to preserve the question in the review authorized by a Court of Appeals, but our request was made in the District Court as is shown by our petition.

XIII.

United States Auto Co. vs. DeShong, 134 Ark. 392.

The respondent relies upon this case, intimating that said case modifies the decision of the Supreme Court of Arkansas in Grist vs. Lee. That contention is clearly erroneous. In this DeShong case, the Supreme Court of Arkansas expressly reaffirms the doctrine of Grist vs. Lee. In addition, the DeShong case was a suit in tort, and a demand of a judgment for the money resulting from the sale of the automobile was also in tort. *Hence there was no change from a tort to contract, or contract to tort.* The Supreme Court of Arkansas said: *"Here there is no change in the cause of action."* It is therefore observed that the DeShong case affirms the doctrine of Grist vs. Lee.

XIV.

Errors of the Court of Appeals and respondent as to payment of the stock with a note.

The Court of Appeals and the respondent entirely overlook the undisputed evidence of Baker, in effect, that he assented to the postponement or delay in the delivery, and that he never again discussed the subject until February 3, 1936, and that by reason of his evidence there was no breach of the contract on December 7, 1935, and hence the doctrine as to payment in chattels has no application.

It is respectfully submitted that under the Arkansas law, and under the decisions of this court in the case of *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, and *Ruhlin* v. *New York Life Ins. Co.,* 304 U. S. 302, and the other cases elsewhere cited, the petition for certiorari should be granted and the cause should be reversed.

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